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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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In the Matter of

Application for Review  
of 47 C.F.R. § 73.658(k),  
the Prime-Time Access Rule

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MMB File No. 870622A  
MMB File No. 900418A  
MMB File No. 920117A

To: The Commission

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REPLY COMMENTS OF  
THE COALITION TO ENHANCE DIVERSITY

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July 14, 1994

## TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY.....	1
I. <b>OPPONENTS OF PTAR REFORM HAVE FAILED TO DEMONSTRATE THAT THE OFF-NETWORK RESTRICTION SERVES THE PUBLIC INTEREST</b> .....	4
A.     In Evaluating The Video Marketplace, The Commission Should Take Account Of All Viewer Options.....	4
B.     The Off-Network Restriction Now Creates Negative Consequences .....	7
1.     Diversity Is Sadly Lacking On Network Affiliates During Access .....	7
2.     The Off-Network Restriction Incontestably Imperils The Viability Of Off-Network Syndication — Thereby Undercutting The Ability Of Producers To Finance New, High-Quality Network Television Programming .....	9
II. <b>INDEPENDENT STATIONS HAVE FAILED TO ESTABLISH THE NEED OR JUSTIFICATION FOR A GOVERNMENT-MANDATED SUBSIDY</b> .....	10
A.     The Independent Stations Fundamentally Misconceive The Purpose Of The Off-Network Restriction .....	10
1.     The Purpose Of The Off-Network Restriction Has Always Been To Reduce Network Pressure On Affiliates And To Create A Market For First-Run Programming.....	10
2.     The Restriction Was Never Intended To Prop Up Economically Troubled Stations Of Any Kind .....	13
3.     The Restriction Promotes Only Private And Parochial Interests — Not Those Of The Public.....	15
B.     The Off-Network Restriction Indisputably Benefits The Largest Independent Stations, Who Are In No Need Of Special Protection .....	16
C.     Independent Stations Have Failed To Show That They Use Proceeds From The Off-Network Restriction To Subsidize Public Affairs Or News Programming .....	18
III. <b>FIRST-RUN PROGRAMMING WOULD CONTINUE TO THRIVE IN ABSENCE OF THE OFF-NETWORK RESTRICTION</b> .....	21
CONCLUSION .....	23

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To: The Commission

### REPLY COMMENTS OF THE COALITION TO ENHANCE DIVERSITY

The Coalition to Enhance Diversity ("Coalition"),<sup>1</sup> by its attorneys, hereby submits this reply to comments filed in connection with the above-captioned application and petitions concerning the Prime-Time Access Rule ("PTAR"). The comments filed with the Commission support, and do not refute, the Coalition's contention that the FCC should promptly issue a Notice of Proposed Rulemaking calling for repeal of PTAR's off-network restriction, 47 C.F.R. § 73.658(k).

### INTRODUCTION AND SUMMARY

The evidence submitted in response to the Commission's call for comments strongly supports the proposition that the off-network restriction should be eliminated as soon as possible. Tacitly acknowledging the inevitability of repeal of this archaic restriction, the opponents of reform engage in a number of delaying tactics. In this regard, they vigorously contend that the FCC should continue to collect evidence until well after it has dealt with the Financial Interest and Syndication ("fin-syn") rules in 1995, that the video marketplace must undergo certain undetermined further changes before PTAR reform becomes ripe for consideration, and that the

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<sup>1</sup> Members of the Coalition are listed in Appendix A. As that attachment reflects, several entities have joined the Coalition since the filing of the group's opening comments in the above-captioned matters. See Comments of the Coalition to Enhance Diversity, MMB File No. 870622A, at app. A (filed June 14, 1994) ("Coalition Comments").

FCC must conduct a massive and protracted inquiry before the agency can even issue a Notice of Proposed Rulemaking on this topic.

The Commission should reject these desperate attempts to put off for tomorrow what can and should be decided today. The facts are apparent, and almost entirely uncontested by the defenders of the status quo. The video marketplace has experienced a radical transformation since the rule was adopted, ensuring that today's viewers have access to a wide diversity of programming choices. While the ability of ABC, CBS, and NBC to capture prime-time audiences has eroded, the first-run syndication business is flourishing. Given this evolution, the off-network restriction cannot function as the FCC intended.

The off-network restriction is an anachronism that creates a host of unintended negative consequences — and the opponents of reform are unable to prove otherwise. These entities are reduced, in their more candid moments, to the contention that producers of network programming should continue subsidizing independent stations and that economic “rents” should be forcibly shifted from network affiliates to producer/syndicators of first-run syndicated programming. Neither of these wealth transfers serve the public interest. To the contrary, they imperil the financing of the high-quality network television programming that the public has come to enjoy.

In contrast to those who benefit from the off-network restriction, those calling for reform are a remarkably broad-based group representing diverse — and, indeed, sometimes antithetical — interests. Yet all these entities agree that the off-network restriction now operates to actively harm the public interest. The Coalition itself is composed of local broadcasters, independent producers, and public interest entities well known for their expertise in communications issues. While these parties have often disagreed over broadcast policy, they are united in recognizing the off-network restriction's irrelevance in today's television environment. Beyond the Coalition, those weighing in against the off-network restriction include networks subject to the rule, regulated affiliates, and associations representing various segments of the television production industry.<sup>2</sup>

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<sup>2</sup> See, e.g., Comments of Bonneville Int'l. Corp., MMB File No. 870622A (filed June 14, 1994); Comments of CBS Inc., MMB File No. 870622A (filed June 14, 1994); Comments of NATPE Int'l., MMB File No. 870622A (filed June 14, 1994); Comments of National Broadcasting Co., Inc., MMB File

Most remarkable, perhaps, is that entities who have joined in the call for eliminating the off-network restriction once supported — or still benefit from — the rule. Group W, the “original proponent” of the rule, now believes that “the basic competitive changes” in the broadcast world “mandate the prompt initiation of proceedings to consider repeal of the off-network provision.”<sup>3</sup> Even the Fox Broadcasting Company, the “non-network” and active syndicator which arguably gains most from application of the off-network restriction to its rivals, believes “that the public interest in competition and innovation will be well served by the broad deregulation” of the broadcasting industry and thus supports the restriction’s repeal.<sup>4</sup>

Given this broad call for action now, the Commission need not and should not link this proceeding with its promised reexamination of the fin-syn rules next year. First, each of these regulatory regimes is complicated enough. The Commission clearly understands this, for it has already determined that the two matters are to be reviewed separately.<sup>5</sup>

Second, the facts are available today to demonstrate the need to repeal the off-network restriction. These facts show that neither of the two groups that reap benefits from the off-network restriction — the most powerful independents in the top fifty markets and the few dominant producers of first-run syndicated programming — need or deserve a continuation of special government-mandated subsidies.

Third, the significant harms created by the off-network restriction would be magnified should the Commission delay. Because of the long-term contractual nature of the syndication

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No. 870622A (filed June 14, 1994); Comments of the Network Affiliated Stations Alliance, MMB File No. 870622A (filed June 14, 1994).

<sup>3</sup> Supplemental Comments of Group W, MMB File No. 870622A, at 1, 2-3 (filed June 14, 1994) (Given the rise of the Fox network and growing strength of its affiliates, “the disparate treatment of similarly situated competitors in a market [is] patently unfair, [and] the situation could become even more ludicrous in an environment of shifting affiliations in the market.”).

<sup>4</sup> Letter from Preston Padden, Executive Vice President, Fox Broadcasting Company, to Reed Hundt, Chairman, FCC (June 13, 1994).

<sup>5</sup> *Evaluation of the Syndication and Financial Interest Rules*, 5 FCC Rcd 6463, 6469 (1990) (“We did not propose, and we shall not, revisit or revise the PTAR in this [fin-syn] proceeding.”). Cf. *Amendment of § 73.658(i) of the Commission’s Rules, Concerning Network Representation of TV Stations in National Spot Sales*, 5 FCC Rcd 7280, 7281 (1990) (agency recognizing value of separately considering rule changes that “could affect the competitive balances in the broadcast industry”).

business, any postponement likely will mean that the unwarranted subsidies and lost programming opportunities identified by the Coalition will lead to repeated losses, with negative ramifications for years to come. This practical reality underscores the urgency of the problem. Accordingly, the FCC should move forward promptly with a proceeding to repeal the off-network restriction.

**L     OPPONENTS OF PTAR REFORM HAVE FAILED  
TO DEMONSTRATE THAT THE OFF-NETWORK  
RESTRICTION SERVES THE PUBLIC INTEREST.**

A review of current marketplace conditions that *fairly* assesses the options available to viewers makes clear that the off-network restriction is an anachronism. More fundamentally, though, this restriction no longer serves any valid public interest objective, and it has irrefutably been shown to harm the public interest.

**A.     In Evaluating The Video Marketplace, The Commission  
Should Take Account Of All Viewer Options.**

As the FCC has repeatedly recognized in a variety of contexts, viewers in today's video marketplace are presented with a diverse array of options from many sources. The Commission well understands that diversity is measured by the video options available to viewers, who currently watch far more than just broadcast stations.<sup>6</sup> The agency should therefore continue to resist calls from opponents of reform who would artificially limit the Commission's focus to the restricted viewing options of a bygone era.<sup>7</sup> Similarly, INTV's lengthy recounting of the

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<sup>6</sup> See, e.g., *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd 3996, 3999-4002 (1991) ("OPP"); *Elimination or Modification of Section 73.658(c) of the Commission's Rules*, 4 FCC Rcd 2755 (1989) (eliminating two-year cap on duration of network affiliation agreements based in part on "changes in the television market place," including "the increase in number of broadcast outlets" and "a proliferation of alternative delivery systems, such as cable television").

<sup>7</sup> MAP relies on a distorted characterization of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to support its contention that only broadcast stations should be counted. Comments of the Media Access Project, MMB File No. 870622A, at 9-10 (filed June 14, 1994) ("MAP Comments"). Congress did not, however, ignore cable's contribution to the diversity of voices now available to television viewers. Rather, Congress was concerned primarily with addressing the operators' allegedly monopolistic pricing power — stemming from the fact that, in most communities, only one operator provides cable service.

Commission's analyses of the state of the television market during the 1970s is simply beside the point.<sup>8</sup> Neither of these discussions proves anything in regard to the video marketplace of 1994.

Moreover, the success or failure of certain first-run syndicators in selling programming to cable operators does not diminish by one iota the wide selection of programming cable operators are in fact delivering to the majority of U.S. television households.<sup>9</sup> Whether the programming originates at home or abroad, from news organizations or movie studio vaults or from local cable origination, the American public already enjoys a much greater diversity of voices than the Commission could possibly have envisioned two decades ago.

The magnitude of the transformation, in fact, compels the Commission to review the off-network restriction in light of all developments in viewing options. As the courts have repeatedly made clear, "it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'"<sup>10</sup> While an agency such as the FCC has "wide latitude to make policy based upon predictive judgments," such discretion "implies a correlative duty to evaluate its policies over time to ascertain whether they work — that is, whether they actually produce the benefits the Commission originally predicted they would."<sup>11</sup> Furthermore, the courts have expressly recognized that "[i]n an industry as mutable as telecommunications, rules that do not automatically expire at a fixed date are not thereby given eternal life."<sup>12</sup> Rather, with the passage of years after initial enactment, "the situation in the industry may be so different that the rule will be thoroughly obsolete."<sup>13</sup>

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<sup>8</sup> Comments of the Association of Independent Television Stations, Inc., MMB File No. 870622A, at 10-16 (filed June 14, 1994) ("INTV Comments").

<sup>9</sup> See Comments of King World Productions, Inc., MMB File No. 870622A, at 11 (filed June 14, 1994) ("King World Comments") (complaining about inability to gain access to cable systems).

<sup>10</sup> *Bechtel v. FCC*, 957 F.2d 873, 880 (D.C. Cir. 1992) (citing *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981), *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979), and other cases), *cert. denied sub nom. Galaxy Communications v. FCC*, 113 S. Ct. 57 (1992).

<sup>11</sup> *Id.* (citations omitted). See also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("The Commission should be alert to the consequences of its policies and should stand ready to alter its rule is necessary to serve the public interest more fully.")

<sup>12</sup> *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1290 (7th Cir. 1985).

<sup>13</sup> *Id.*

The Coalition, among other parties in this proceeding, has set forth in detail the rapid change and explosive growth that characterizes the modern video marketplace.<sup>14</sup> The number of television stations has almost doubled, a new broadcast network has emerged (with others apparently on the way), and cable systems and other multichannel programming providers have exponentially increased viewers' options. While not all of these outlets may be able to provide original network-quality programming, together they have aptly justified the Commission's prediction that the off-network restriction would not have to be a permanent fixture of the broadcast regulatory landscape.<sup>15</sup>

The FCC's recognition of the profound changes in the television landscape has already led the agency to modify or revoke rules that have become outmoded, such as the old seven-station television ownership cap and certain sections of the fin-syn rules.<sup>16</sup> Just two days ago, the Seventh Circuit concluded that by virtue of the marketplace changes which have "battered" ABC, CBS, and NBC, the Commission's old "fears about the consequences of unleashing the networks to compete with independent producers, syndicators, and stations had become almost entirely chimerical."<sup>17</sup> Indeed, even more significant changes are now being considered as a result of the agency's sweeping review of many long-standing television ownership and network restrictions.<sup>18</sup> Because "the policies of the FCC and the entire federal government (e.g., the 1984 Cable Act)

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<sup>14</sup> Coalition Comments at 3-4. Even opponents of reform themselves concede that "the number of independent television stations had quadrupled since 1970 and doubled since 1983." Comments of the FBC Television Affiliates Ass'n, MMB File No. 870622A, at 8 (filed June 14, 1994) ("Fox Affiliates Comments") (number of indies grown from 90 in 1970 to more than 400 today).

<sup>15</sup> See Coalition Comments at 2.

<sup>16</sup> See *Multiple Ownership of AM, FM, and Television Broadcast Stations*, 18 F.C.C. 288 (1953) (limiting ownership of broadcast stations to seven stations); *Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984), *recon.*, 100 F.C.C.2d 74 (1985) (revising seven-station rule to permit ownership of as many as twelve stations); see also *Network Television Broadcasting*, 23 F.C.C. 2d 382 (1970) (implementing Financial Interest and Syndication rules); *Evaluation of the Financial Interest and Syndication Rules*, 8 FCC Rcd 3282, *recon.*, 8 FCC Rcd 8270 (1993) (substantially relaxing the rules and setting a sunset date for the remaining restrictions), *aff'd*, *Capital Cities/ABC, Inc. v. FCC*, No. 93-3458 (7th Cir. July 12, 1994).

<sup>17</sup> *Capital Cities/ABC*, slip op. at 5.

<sup>18</sup> *Review of the Commission's Regulations Governing Television Broadcasting*, 7 FCC Rcd 4111 (1992).



spawned new competition to broadcast services” resulting in “a plethora of new services and choices for video consumers,” the FCC is considering modification of many rules in response to these changes.<sup>19</sup>

The comments of the Coalition and other proponents of reform have demonstrated that the off-network restriction is another lingering remnant of a past regulatory era. Repeal of the rule would be in keeping with the Commission’s efforts to bring its regulations into line with today’s marketplace realities.

**B. The Off-Network Restriction Unquestionably Creates Negative Consequences.**

The opponents of reform have not, and cannot, refute the Coalition’s showing that the off-network restriction today gives rise to a host of negative consequences. The rule has artificially subdivided the market for access programming — forcing affiliates to rely on first-run shows while effectively limiting independents to off-network programs. In the process, the restriction has put at risk the future of quality prime-time programming without providing countervailing benefits to the public.

**1. Diversity Is Sadly Lacking On Network Affiliates During Access.**

The off-network restriction’s most notable failure has been its inability to generate the diversity in access programming which the Commission had anticipated.<sup>20</sup> In particular, the FCC’s hope that the rule would promote additional local programming has not led to widespread production of such fare. And while first-run fare has become more competitive, this development has not led to a corresponding increase in viewer choice. Rather, as the Coalition has demonstrated, the programming of three companies now dominates the access period on regulated

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<sup>19</sup> *Id.* Those proposals include raising the national TV station ownership cap to as much as twice the current limit, eliminating the ban on ownership of several broadcast stations in the same market, and lifting the restriction that prevents networks from becoming multichannel competitors using over-the-air signals.

<sup>20</sup> See Coalition Comments at 5-6.

stations. Most of these programs fall into one of two relatively inexpensive programming genres, games shows or "reality based" programs. Just ten first-run programs account for 71% of the regulated affiliates' access periods. Indeed, four shows (two of each of the predominant genres) account for 49% of all time slots subject to the rule.<sup>21</sup>

While some opponents of reform implicitly acknowledge the off-network restriction's failure to promote diversity in access periods on regulated affiliates, these parties feebly attempt to cloak the problem in the mantle of the First Amendment.<sup>22</sup> Decrying the extent to which any party might "make qualitative judgments about the [first-run] independent programming that has developed as a result of PTAR," MAP argues that "it is not the role of the Commission, or anyone else, to make such content-based judgments."<sup>23</sup> INTV adds that "the Commission rightly has kept program tastes and quality out of the equation."<sup>24</sup>

The Coalition certainly agrees that the Constitution limits the FCC's authority to interfere in programming decisions.<sup>25</sup> But it is curious that MAP's and INTV's sensitivity to First Amendment rights does not extend to the network affiliates in the top fifty markets. Thanks to the off-network restriction, which MAP and INTV staunchly defend, these top fifty affiliates are barred by the government from exercising their full range of programming choices.

The First Amendment's purpose is not simply to promote the interests of independent stations and first-run syndicators. It extends to all participants of the video marketplace (albeit somewhat differently depending upon the medium). The claim that the First Amendment precludes the Commission from examining the consequences of its own regulations is specious. The Coalition does not call upon the FCC to review the content of first-run programming. However, it is certainly proper and, moreover, now necessary for the agency to reexamine a

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<sup>21</sup> *Id.* at 7, Fig.2.

<sup>22</sup> See MAP Comments at 5-6 (resting its entire policy argument on the ramifications of the restriction for independent stations); INTV Comments at 21-22.

<sup>23</sup> MAP Comments at 5-6.

<sup>24</sup> INTV Comments at 23.

<sup>25</sup> See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

regulation that has failed to foster the diversity of programming sources that the Commission intended.

**2. The Off-Network Restriction Incontestably Imperils  
The Viability Of Off-Network Syndication — Thereby  
Undercutting The Ability Of Producers To Finance  
New, High-Quality Network Television Programming.**

The guardians of the status quo are noticeably silent regarding the off-network restriction's harmful effects on the development of quality prime-time network programming. The facts are, in fact, irrefutable. As the Coalition has explained, the restriction creates two unwarranted subsidies. First, it unreasonably forces the regulated affiliates to subsidize first-run producer/syndicators.<sup>26</sup> By precluding these stations from carrying off-network shows in the access period, the regulation effectively reduces affiliates to "captive buyers" for the three companies that dominate the supply of first-run syndicated fare. There is no justifiable public policy reason for a massive subsidy to the three powerful first-run syndicators that together control 93% of all syndicated access programming aired by affiliates in the top fifty markets.<sup>27</sup>

Furthermore, the off-network restriction has unreasonably forced suppliers of off-network shows to subsidize the owners of major-market independent stations.<sup>28</sup> By removing the regulated affiliates from the customer base for these suppliers, the restriction artificially suppresses the price of off-network shows to independents.<sup>29</sup> Because subsequent off-network syndication is an essential component of the financing of prime-time network fare, repeal of the restriction will help to eliminate the pressures now threatening the quality of programming produced for ABC, CBS, and NBC.

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<sup>26</sup> Coalition Comments at 6-7.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 8-15.

<sup>29</sup> This problem has been further exacerbated by a continuing decline in the demand for off-network syndicated programs stemming from the development of the Fox network. As numerous independents have become Fox affiliates, their prime-time schedules have become largely closed to off-network shows. At the same time, "off-Fox" shows are contributing to a glut in the supply of off-network programs.

## **II. INDEPENDENT STATIONS HAVE FAILED TO ESTABLISH THE NEED OR JUSTIFICATION FOR A GOVERNMENT-MANDATED SUBSIDY.**

The Commission has been assigned the task of promoting competition, not that of protecting individual competitors. Since the best that can be said about the off-network restriction is that it helps certain private parties at the expense of others, the rule should be repealed.

### **A. The Independent Stations Fundamentally Misconceive The Purpose Of The Off-Network Restriction.**

INTV and the other opponents of reform seek to revise history by casting the salvation of independent stations as the primary impetus for the off-network restriction.<sup>30</sup> The restriction was never intended to funnel money to independent stations in any way, either by protecting them from vigorous competition by network affiliates or by economically propping up those independents who cannot earn a place for themselves among viewers' choices.

#### **1. The Purpose Of The Off-Network Restriction Has Always Been To Reduce Network Pressure On Affiliates And To Create A Market For First-Run Programming.**

As at least one opponent of reform correctly states, the rule was adopted as part of "a regulatory scheme to reduce the dominance of ABC, CBS, and NBC and open up avenues for more diversity in television programming."<sup>31</sup> When the restriction was adopted, the Commission recognized that network affiliated stations represented the only meaningful opportunity for the promotion of diversity in prime-time programming. At that time, these stations collectively comprised the overwhelming majority of TV stations in existence, captured more than 90% of the prime-time audience, and were, in fact, the only option available to TV viewers of that era in most markets.<sup>32</sup>

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<sup>30</sup> See, e.g., INTV Comments at 34-40; MAP Comments at 5-8, Fox Affiliates Comments at 7-8.

<sup>31</sup> Fox Affiliates Comments at 11.

<sup>32</sup> See Coalition Comments at 3; see, e.g., 1970 Broadcasting Yearbook 23-50; 1971 Broadcasting Yearbook 17-44 (listing television stations serving each market).

The Commission's implementing orders clearly reveal that this vision of a three-station universe was the basis for the agency's regulatory concerns. The agency's discussion in *PTAR I* was primarily devoted to the "centralized control" that networks were then thought to exercise over the nation's television fare. Specifically, the FCC expressed concern over the large number of affiliated stations in comparison with the small number of independent stations, the extremely limited amount of non-network programming aired by affiliates during prime time, and the "virtual disappearance of high cost, prime-time, syndicated programming."<sup>33</sup> Both the 1970 and 1975 decisions reflect the agency's clear expectation that the off-network restriction, by limiting network control over affiliated stations' prime-time schedule, would stimulate the development of new first-run syndicated programming.<sup>34</sup>

As MAP acknowledges, the rule also was designed to "free[ ] an affiliate from the yoke of the networks"<sup>35</sup> by opening time on those stations for non-network programming. In addition, the Commission stated that it would welcome any derivative benefit that UHF stations might enjoy from a more active first-run market. The FCC naturally hoped for such a development. But this hope was, at most, a peripheral one. It therefore should be no surprise that the opponents of reform consistently cite the same one or two isolated quotes from the orders implementing *PTAR* that deal with the potential effects on independent stations — for these represent essentially the *only* mention of the issue.<sup>36</sup>

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<sup>33</sup> *Network Television Broadcasting*, 23 F.C.C. 2d 382, 385-93 ("*PTAR I*"), *recon.*, 25 F.C.C. 2d 318, *aff'd*, *Mt. Mansfield Television Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1970).

<sup>34</sup> *See, e.g.*, *PTAR I*, 23 F.C.C. 2d at 395 ("the essential purpose of the rule [is] to open the market to first run syndicated programs"); *Prime Time Access Rule*, 50 F.C.C. 2d 829, 836 ("*PTAR III*") (abandoning changes wrought by *Prime Time Access Rule*, 44 FCC 2d 1081 (1973) ("*PTAR II*")), *aff'd in part and rev'd in part sub nom. National Ass'n of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). Opening up an hour of time on affiliated stations would thus help independent producers, who would "have the opportunity to develop their full economic and creative potential under better competitive conditions than are now available to them." *PTAR I*, 23 F.C.C. 2d at 397.

<sup>35</sup> MAP Comments at 14; *see also* INTV Comments at 20.

<sup>36</sup> *See, e.g.*, INTV Comments at 34; Fox Affiliates Comments at 7.

In *PTAR I*, the FCC addressed the question of independent stations in a cryptic and rather oblique fashion.<sup>37</sup> Because the rule did not limit networks' freedom to produce more prime-time programming (but merely barred them from airing it over stations in the top fifty markets), the agency speculated that networks would lodge their excess prime-time programming with independent stations in those top markets.<sup>38</sup> The Commission also noted that a general increase in syndicated program supply would benefit both independent "and, indeed, affiliated" stations.<sup>39</sup> By the time of *PTAR III* — when the networks had cut back their prime-time schedules across the nation — the FCC simply stated that the rule would stimulate the supply of first-run syndicated programming and thus provide "a concomitant benefit to independent stations."<sup>40</sup>

These brief references in the original record make plain that concerns relating to independent stations were, at best, an adjunct to the agency's enactment of the off-network restriction. The claim that *PTAR* was intended to permanently shelter independent stations from competition for access programming is simply not credible.

The Coalition has shown, in fact, that the off-network restriction now operates as a real impediment to affiliates — a point that MAP acknowledges "may well be true."<sup>41</sup> Yet while MAP recognizes that the restriction "limits licensees' program discretion and impedes their competitive ability for up to one hour each day," it goes on to make the astounding statement that the rule "was intended to disadvantage the network affiliates because of the huge advantage they

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<sup>37</sup> See *PTAR I*, 23 F.C.C. 2d at 395. See also *Prime Time Access Rule*, 44 F.C.C. 2d 1081 (1973) ("*PTAR II*"), *recon.*, 46 F.C.C. 2d 1013, *rev'd and remanded sub nom. National Ass'n of Independent Television Producers & Distributors v. F.C.C.*, 502 F.2d 249 (2d Cir. 1974), *on remand*, 50 F.C.C. 2d 829 ("*PTAR III*"), *aff'd in part and rev'd in part sub nom. National Ass'n of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975), *on remand*, 53 F.C.C. 2d 335 (1975). The Commission's *PTAR III* decision largely abandoned the changes wrought by *PTAR II* and instead returned to the approach of *PTAR I*.

<sup>38</sup> "Not only the public interest in the fostering of UHF would benefit, but affiliates in markets below the top 50 could continue to broadcast the longer network schedule." *PTAR I*, 23 F.C.C. 2d at 395.

<sup>39</sup> *Id.* "The entire development of UHF should be benefitted."

<sup>40</sup> 50 F.C.C. 2d at 835.

<sup>41</sup> MAP Comments at 14.

have for the other twenty-three hours of the broadcast day.”<sup>42</sup> Of course, MAP provides no support for this startling assertion. As demonstrated above, MAP interpretation is baseless because the Commission’s original goals included helping affiliates to gain greater control over their programming decisions.

## **2. The Restriction Was Never Intended To Prop Up Economically Troubled Stations Of Any Kind.**

The opponents of reform assert that the differences between independent and network-affiliated stations, or between UHF and VHF stations, alone justify the continued existence of the off-network restriction — even if that notion was never contemplated by the Commission when promulgating the rule.<sup>43</sup> As the Coalition has explained, the very structure of the rule itself makes clear that it was not crafted to shield economically troubled stations. If that had been the case, the restriction would not exempt markets below the top fifty, where the poorest, most marginal stations exist.<sup>44</sup>

Several opponents of reform attempt to build a case that because many independents are UHF stations, they are permanently handicapped as competitors against VHF stations.<sup>45</sup> Recent marketplace developments indicate that whatever technological inferiority UHF stations may have had in an exclusively over-the-air environment has been largely overcome, principally because of the high-quality reception provided today through cable carriage.<sup>46</sup> Indeed, ABC has just

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<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> See King World Comments at 8 (decrying the “assum[ption]” that “various video distribution systems ... are as well suited to the launch of new first-run syndicated programming” as the regulated affiliates); INTV Comments at 7.

<sup>44</sup> Coalition Comments at 20 (citing data showing that “[t]he link between market size and marginality is indisputable.”).

<sup>45</sup> INTV Comments at 7 & n.13; Fox Affiliates Comments at 2; MAP Comments at 11.

<sup>46</sup> See *OPP*, 6 FCC Rcd at 4012 (“Cable carriage of over-the-air signals reduces the disadvantage of UHF relative to VHF stations by increasing UHF stations’ geographic reach and improving their reception quality”); *Capital Cities/ABC*, slip op. at 6 (with “their weak UHF signals brought to parity with VHF by cable television,” independents no longer “seem as vulnerable to the competition from network-owned and -affiliated stations”).

announced that it has acquired UHF affiliates in the Tampa and Phoenix markets.<sup>47</sup> Such a deal certainly would not have transpired if that network had believed that UHF stations were technologically incapable of competing fiercely for viewers.

It should go without saying that the FCC does not guarantee any station's success in the market. Nor does the agency operate a price-support program to ensure that all broadcast competitors receive equivalent financial returns from their station operations. Thus, while the fortunes of the affiliates of ABC, CBS, and NBC may fluctuate dramatically in any one year depending on the ratings success of their respective networks, the Commission does not impose regulations creating subsidies to compensate the third-place finisher.

As a general policy matter, the FCC has expressly eschewed such goals in regulating broadcasters. The agency made that policy plain in abandoning the so-called *Carroll* doctrine.<sup>48</sup> *Carroll* had posited that, in certain circumstances, the economic consequences of licensing a new station could lead to an overall derogation of service to the public — thus requiring Commission to evaluate an existing broadcaster's evidence of the "detrimental economic effect" that allegedly would result from licensing a new competitor.

Once the *Carroll* doctrine was put into operation, however, the Commission discovered that it was merely a defensive weapon brandished by established players in the marketplace to ward off nascent challengers: "It appears that, to the extent that such [*Carroll*] claims have had any effects on the public interest, those effects have been negative."<sup>49</sup> Today, the off-network restriction is being used as the same type of anti-competitive cudgel, with no countervailing public interest benefit.

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<sup>47</sup> See *Affiliates change partners again*, Broadcasting & Cable, June 27, 1994, at 6.

<sup>48</sup> See *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638, 638 (1988) (rejecting the rationale of *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958)).

<sup>49</sup> *Id.* at 640 (noting that delays "work to the advantage of existing stations in the market, enabling them to delay competition in an attempt to further enhance their own position"). In fact, during the decades of the doctrine's existence, the FCC never refused to issue a new television license on *Carroll* grounds.



### **3. The Restriction Promotes Only Private And Parochial Interests — Not Those Of The Public.**

As the comments of the Fox Affiliates demonstrate, the off-network restriction today serves only the private business interests of certain select participants in the multichannel marketplace.<sup>50</sup> The regulatory positions taken by these favored stations is easily understood: why wouldn't the Fox Affiliates hope to retain an unfair competitive advantage over their affiliate rivals while also enjoying the advantages of their own network affiliation? Yet even the Fox network cannot bring itself to justify a restriction that so openly discriminates among similarly situated competitors.<sup>51</sup>

The Fox Affiliates tacitly concede the weakness of their substantive arguments by leading off with a baseless procedural claim that there is a lack of "record evidence" that the off-network restriction is anachronistic.<sup>52</sup> The Fox Affiliates then try to obscure their privileged status by depicting themselves as true independents, bereft of the advantages inherent in a network-affiliate relationship. This argument is without merit. Whatever the treatment of Fox may be under the Commission's definition of a "network," for all practical purposes the Fox Affiliates happily relinquished their independent status long ago.<sup>53</sup>

The Fox Affiliates' attempts to portray themselves as puny loners lacking network connections should not mislead the Commission. It certainly has not fooled even the Fox Affiliates' erstwhile allies in this matter. MAP, in its zeal to protect the off-network restriction, recognizes the anomaly that is inherent in continuing a preferred exemption from the rule for these

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<sup>50</sup> Fox Affiliates Comments at 11.

<sup>51</sup> See Padden letter, *supra* note 4.

<sup>52</sup> Fox Affiliates Comments at 6. To the contrary, as the Coalition demonstrated, the video marketplace has experienced a startling metamorphosis since 1970 to which the Commission has responded. Coalition Comments at 2-4.

<sup>53</sup> While the FCC may have accepted the notion that independents benefitted from the availability of "hit off-network shows," *Evaluation of the Syndication & Financial Interest Rules*, 8 FCC Rcd 8270, 8294 & n.64 (1993), the agency did *not* explicitly include the Fox Affiliates within the term — a point the Fox Affiliates apparently concede. Fox Affiliates Comments at 11 (claiming to be "no different" than the true independents to which the FCC referred).

powerful stations. It argues that the success of the Fox network should not lead to elimination of the restriction — but merely to extension of the restriction to Fox and its affiliates.<sup>54</sup>

Similarly, INTV's characterization of the case for reform as mere "whin[ing]" about a business restriction is hardly persuasive, given that association's vested interest in preserving an outmoded restriction that mainly benefits its largest, most powerful members.<sup>55</sup> As demonstrated below, the Coalition's submission has conclusively demonstrated that the beneficiaries of the off-network restriction are *not* the small, weak independents struggling to stay on the air.

**B. The Off-Network Restriction Indisputably Benefits The Largest Independent Stations, Who Are In No Need Of Special Protection.**

The opponents of reform claim, over and over, that the off-network restriction is the main guarantor of their survival. Yet they offer no contemporary data to support this refrain. Rather, the only up-to-date facts before the Commission are those submitted by the Coalition, which demonstrate that the main beneficiaries of the off-network restriction are the most successful independents in the top fifty markets.<sup>56</sup> In those markets, there are only sixty-nine independents which are not affiliated with Fox and which are plausible candidates for the purchase of popular off-network shows.<sup>57</sup> And of this number, only sixteen are neither owned by a broadcast group nor affiliated with the two imminent networks.<sup>58</sup>

Contrary to the claims of some opponents of reform, the stations enjoying the advantages afforded by the off-network restriction offer serious competition to network affiliates during the access period. A quick glance at recent average Nielsen ratings in the top ten markets for the hour-

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<sup>54</sup> MAP Comments at 8 n.8.

<sup>55</sup> INTV Comments at ii; *see also id.* at 7. Furthermore, the only data that both INTV and the Fox Affiliates advance are eight years old. *See* INTV Comments at 35-36; Fox Affiliates Comments at 10 (both drawing on 1986 INTV study of independents' finances). It is curious that while these parties plead for more time to update the record, they have bypassed an obvious opportunity to supply relevant, up-to-the-minute information to bolster their own positions.

<sup>56</sup> Coalition Comments at 18-21.

<sup>57</sup> These are the independents that actively purchase off-network programming and post audience ratings of at least 1.0. Our count excludes predominantly religious, home shopping, or foreign-language stations.

<sup>58</sup> *See* Coalition Comments at 18.

long period proves the point.<sup>59</sup> In New York, not just one but two non-Fox independents beat NBC's owned-and-operated ("O&O") station during access. In both Chicago and Dallas-Fort Worth, one independent earns higher ratings than two of the regulated network stations and the local Fox station. Other top ten markets provide still more examples of such healthy competition.<sup>60</sup>

Where independents fail to mount healthy challenges to the local ABC, CBS, or NBC affiliate in access, it is in part due to the operation of the off-network restriction, which makes the most popular first-run programming unaffordable for the majority of such stations. The Coalition Comments explain how the off-network restriction artificially drives up the price of first-run programming.<sup>61</sup> Consequently, while independents legally are free to air any programming they choose, most nonetheless must sit by as the bidding for popular first-run programming — such as King World's "Jeopardy" and "Wheel of Fortune" — climbs beyond their financial means. This assertion is borne out by the data, which show that affiliates account for 98% of King World's total clearances for access programming in the top fifty markets. Repeal of the off-network restriction would restore a market-based equilibrium to prices generally, thus affording independents a more realistic opportunity to acquire popular first-run shows.

Despite the real benefits expected to accrue to independents from eliminating the off-network restriction, the opponents of reform trot out an array of intricate but ultimately implausible arguments to buttress their claim that independents will wither in the absence of the rule. For example, MAP attempts to recast the off-network restriction as a component of the Commission's equal employment opportunity rules.<sup>62</sup> Even assuming *arguendo* that independent stations are disproportionately owned by women and minorities, however, MAP's contention does not refute

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<sup>59</sup> The ratings discussed here were taken in February 1994.

<sup>60</sup> See Nielsen Stations Index, Feb. 1994. (Philadelphia independent ties, and Fox station beats, local CBS station in access; Washington, D.C., Fox station beats NBC station; in Los Angeles, San Francisco, Boston, Detroit, and Houston, at least one or more independents or Fox affiliates are within three ratings or share points of local regulated affiliate).

<sup>61</sup> See Coalition Comments at 21-22.

<sup>62</sup> MAP Comments at 11-12.

the Coalition's showing that the off-network restriction primarily benefits the largest and most economically successful independent stations.

MAP's point apparently is that women and minorities, who continue to struggle to break into station ownership, would fail altogether in the absence of the off-network restriction. However, the facts demonstrate that, contrary to MAP's implicit claims, such "smaller independents" already are "shut out of [off-]network fare."<sup>63</sup> The Coalition Comments have documented at length that the restriction does not sustain the viability of single-station licensees — because these stations can afford neither the off-network "hits" snapped up by the largest independents nor the first-run programs whose prices are artificially inflated by the rule.<sup>64</sup>

In addition, the Commission should not be distracted by the attenuated — and unsubstantiated — claim that the off-network restriction is necessary to the continued health of the Fox network, as well as the success of other new networks now planned.<sup>65</sup> The Fox network itself clearly does not believe the argument. Furthermore, those advancing this notion provide no data to justify it. In fact, this argument for the off-network restriction is nothing more than a rephrasing of the "we need it to survive" claim. But the independents who benefit from the restriction would, indisputably, survive quite well without it. As the Coalition has amply demonstrated, the independents who gain most from the restriction are well-established, mostly group-owned stations, and thus in no need of a government-mandated subsidy.<sup>66</sup>

**C. Independent Stations Have Failed To Show That They Use Proceeds From The Off-Network Restriction To Subsidize Public Affairs Or News Programming.**

The opponents of reform proffer no substantive data to prove their bald assertion that the off-network restriction serves to, in effect, "underwrite" news and public affairs programming.<sup>67</sup>

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<sup>63</sup> *Id.* at 12.

<sup>64</sup> Coalition Comments at 18-21.

<sup>65</sup> See Fox Affiliates Comments at 8; INTV Comments at 8; MAP Comments at 12.

<sup>66</sup> Coalition Comments at 19-20 & nn.68-69.

<sup>67</sup> See, e.g., Fox Affiliates Comments at 8; INTV Comments at 39.

If, in fact, the presence of the off-network restriction aided in the growth of independent newscasts, that impact should have been visible long before the late 1980s to early 1990s, when the industry first recognized the trend.<sup>68</sup>

To the contrary, the growth in independent newscasts is directly traceable to the stations' recognition that local news is a specialized product which they are well positioned to deliver in today's multichannel environment. It is no coincidence that independents have been offering more local news programming as the video marketplace has become increasingly competitive. News programming tailored to specific community concerns affords financial benefits because "[w]ithin a multichannel universe, localism is the only way stations can distinguish themselves."<sup>69</sup>

Independents have learned that such programming

is usually very saleable because it offers a positive identification. A dominant newscast tends to give an independent overall dominance over others in a market, [a programming executive for an independent station group] said, while at the same time bringing a positive identity to the station.

"An independent is just another film projector unless it has a local identity," said [the executive].<sup>70</sup>

Furthermore, independents treat their local newscasts as they would any other revenue-producing programming, "rejiggering" their news schedules and content to maximize audiences and, ultimately, revenue.<sup>71</sup> And while all broadcasters must provide some programming relevant to

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<sup>68</sup> See, e.g., Lou Prato, *The Business of Broadcasting: Independent News Now Threatens Affiliates*, Washington Journalism Review, Sept. 1990, at 47. Prato noted that newscasts on independent stations had "expanded so rapidly and attracted such large audiences in the last two or three years" that the programs "threaten[ed] the domination of network affiliates in many cities. . . . Hour-long newscasts at 10 p.m. at KTUV-TV in San Francisco-Oakland and WTTG-TV in Washington, D.C., both independents, consistently earn higher ratings than their network affiliate counterparts 60 minutes later." *Id.* See also *Success of Indie Newscasts Helped By Operators' Deep Pockets*, Variety, Jan. 3, 1990, at 35 ("the number of indie stations producing local newscasts has doubled since 1982").

<sup>69</sup> *How can I produce good local programming that's affordable?*, Broadcasting, Apr. 6, 1992, at 79. Urging stations to produce more local programming such as newscasts, the author notes that "[t]hese days, any [news] producer or writer should be schooled in the promotability and marketability of material, especially in attracting the key demographics." *Id.*

<sup>70</sup> *Independents Raise News Profiles*, Broadcasting, Dec. 31, 1990 (quoting John Von Soosten, Vice President and Director of Programming for Katz Television).

<sup>71</sup> *WWOR drops noon newscast; WNYW adds one*, The Hollywood Reporter, June 16, 1993, at 14-15.

community issues, neither independents nor regulated affiliates retain local newscasts when it makes no financial sense to do so.<sup>72</sup>

Independents — like affiliates — also have found that expansion of a station's community affairs profile is a fine vehicle for selling their best asset, localism, to audiences and advertisers.<sup>73</sup> According to one industry observer, "independents were the first to do this."<sup>74</sup>

Clearly, then, independents do not follow an "irrational" course, from an economic perspective, when they choose to offer more news and public affairs programming.<sup>75</sup> No "windfall" earnings taken from off-network shows are sacrificed to support less popular programming.<sup>76</sup> Rather, newscasts and other public affairs programs have helped independent stations by maximizing their ratings in carefully selected time periods,<sup>77</sup> thus boosting their advertising revenue.<sup>78</sup>

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<sup>72</sup> See *KCOP Halves "Real News,"* Daily Variety, Apr. 19, 1994, at 1 (noting that KCOP "was the last major indie in Los Angeles to build up its news presence" and that its "low-rated" hour-long newscast was losing to "the other three entrenched independent newscasts"); *NBC affiliate to drop local news,* Broadcasting & Cable, Nov. 22, 1993, at 29 (quoting management explanation that station "simply did not gain enough to continue those expenditures"); *KDOC-TV to End News Operations,* L.A. Times, Nov. 4, 1992, at B2 (independent chose to spend millions to upgrade facilities rather than continue newscast in its "current revenue situation").

<sup>73</sup> See *Community Affairs' New Lustre,* Channels, Aug. 13, 1990, at 18 (public service campaigns "can flush out new advertisers, burnish a station's image, and generate pure gravy via syndication").

<sup>74</sup> *Public affairs serves communities and stations,* Independent Television, Winter 1992, at 17 (quoting Charlotte Ottley, president-elect of the National Broadcast Association for Community Affairs).

<sup>75</sup> Coalition Comments at 23.

<sup>76</sup> *Id.* at 23 n.78.

<sup>77</sup> Independents in big markets blazed the trail by successfully "counter-programming" newscasts at hours when their affiliate rivals are committed to network programming, such as the last hour of prime-time or the hours devoted to morning news. See Prato, *Independent News*, *supra* note 68.

<sup>78</sup> Independent morning newscasts devoted solely to local news have been successful because the rival affiliates' ability to deliver local news is limited to brief spots inserted in national programming. *Hometown coverage,* Forbes, Feb. 15, 1993, at 48 (noting that a Los Angeles independent morning news program that "sticks to local news, traffic, and Hollywood gossip" beats affiliates in the ratings).

### III. FIRST-RUN PROGRAMMING WOULD CONTINUE TO THRIVE IN ABSENCE OF THE OFF-NETWORK RESTRICTION.

No justification exists for a special subsidy to the powerful companies that now dominate first-run syndicated programming.<sup>79</sup> Such programming draws large audiences across the nation, regardless of market size. In markets below the top fifty, where the restriction does not apply, affiliates of ABC, CBS, and NBC still overwhelmingly prefer to air first-run programming in their access periods.<sup>80</sup> The three suppliers who have essentially cornered the first-run market are in no need of continued government protection.

Predictably, the opponents of reform fearfully suggest that network affiliates will stop purchasing first-run programs for their access time slots.<sup>81</sup> Yet elsewhere in their presentations, the same parties freely admit that "[t]here is now a vigorously competitive first-run syndication marketplace, producing a vast array of innovative first-run programs for the viewing public," some of which is "highly competitive with prime-time network fare."<sup>82</sup>

No party in these proceedings disputes the fact that first-run programs generally trounce their off-network competition in the ratings.<sup>83</sup> Actually, the opponents of reform make the case for the strength of first-run programming about as well as the Coalition Comments — which makes their forecasts of affiliate defections from the first-run market all the more inexplicable.

The Fox Affiliates assert that in several of the top markets, "as many as six first-run programs outperformed the highest-rated off-network series in prime time access."<sup>84</sup> It is no

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<sup>79</sup> Coalition Comments at 24-27.

<sup>80</sup> *Id.* at 24-25 (showing that in Markets 51-100, first-run programming controls 69% of the access slots devoted to syndicated fare.)

<sup>81</sup> *See, e.g.*, INTV Comments at 17. The Seventh Circuit, in fact, found the prevailing trend to be quite the opposite: first-run programming has proved to be "so popular . . . that network affiliates now were sometimes bumping their own network's prime-time offerings in favor of programs produced by independent producers." *Capital Cities/ABC*, slip op. at 6.

<sup>82</sup> Fox Affiliates Comments at 8; *see also* MAP Comments at 15 (first-run programming "is very competitive with the off-network programming shown by independents" during the access period); INTV Comments at 24-27 ("the market for first-run access programming is competitive" *id.* at 27).

<sup>83</sup> *See, e.g.*, Fox Affiliates Comments at 9 (noting that "in the vast majority" of top fifty markets, a first-run program is the top rated show in access).

<sup>84</sup> *Id.*

wonder, then, that regulated affiliates “often carry first-run programs even in dayparts where they have the opportunity to air off-network series.”<sup>85</sup>

INTV cogently — if unintentionally — demonstrates that in today’s video marketplace, first-run programming has proven to be more popular than off-network programming regardless of the VHF stations’ supposed competitive advantage. INTV points out that UHF stations airing first-run syndicated programming won higher ratings than UHF independents airing off-network fare — thus proving the Coalition’s point that the quality of the programming, and not its source, is the key to ratings success.<sup>86</sup>

Even King World, while unaccountably shy in its filing about its achievements as the single largest supplier of first-run programming, acknowledges that “there is now” a viable alternative to programming distributed via the ABC, CBS, or NBC networks.<sup>87</sup> Nonetheless, it claims that the unquestioned success of first-run syndication is “both modest and fragile.”<sup>88</sup> As is clear from its complaint that even a mere hint of a change in the rule would “unsettl[e]” its business prospects, King World doth protest too much.<sup>89</sup>

Its business success is so well-established, in fact, that King World’s complaint is meritless. The company recently locked in nationwide clearances for its programs in the early fringe and access periods through the turn of the century.<sup>90</sup> King World’s power as the single largest supplier of first-run access programming has allowed the company to assure itself of at least 70% clearances — and approximately \$1.9 billion in fees — for the rest of the decade,

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<sup>85</sup> *Id.* at 10.

<sup>86</sup> See INTV Comments at 25 (comparing UHF independents and affiliates); see also Coalition Comments at 26 (comparing various independents and reaching the same conclusion about the popularity of first-run programming).

<sup>87</sup> King World Comments at 5.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> See *id.* at 2 (Notice of Inquiry enough to “unsettl[e]” the first-run business, while Notice of Proposed Rulemaking would “perhaps cripple” it).

<sup>90</sup> Coalition Comments at 26-27.



regardless of the Commission's action here. The company lost no time in trumpeting that fact to the industry, as the attached trade publication advertisements indicate.<sup>91</sup>

King World's arguments boil down to the assertion that "the production and distribution of first-run syndicated programs" is "an extremely risky venture with many more failures than successes."<sup>92</sup> Of course, the same can be said of the production and distribution of network programming.<sup>93</sup> The riskiness of program production, in whatever specific form it may take, is no justification for continued government intervention on behalf of a small group of competitors who dominate their segment of the industry. To the contrary, the now-outdated off-network restriction should be eliminated and the market allowed to function according to audience demand.

As the Coalition Comments pointed out, two years ago Steven Palley, King World's chief operating officer, told an industry conference that "[i]f [PTAR] were to change, we don't think there would be any significant impact on our shows."<sup>94</sup> Apparently only when the audience is government regulators does King World suddenly find the off-network restriction — and not the strength of its own work as a producer/syndicator — to be the key to its success.

## CONCLUSION

The opponents of reform have failed to counter the strong arguments favoring prompt elimination of the off-network restriction. A broad, diverse array of broadcasters, networks, producers, and public interest groups have presented facts to show that the restriction now operates to undercut, rather than augment, diversity in television programming. Therefore, the public interest requires that the Commission act with dispatch to repeal the off-network restriction.

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<sup>91</sup> King World advertisements from the June 13, 1994 issue of *Broadcasting & Cable* are attached at Appendix B.

<sup>92</sup> King World Comments at 6.

<sup>93</sup> Coalition Comments at 9 & n.33, 10.

<sup>94</sup> *Id.* at 27 (quoting Oppenheimer's Media and Entertainment Conference Transcript 46 (1992)).